In The

Supreme Court of the United States

October Term, 1979

Docket No. 79-424

In the Matter of the Application
of
THE BOARD OF REGENTS of The University of the State of New York and EWALD NYQUIST, as Commissioner of Education and Chief Administrative Officer of the Education Department of the State of New York,

Petitioners,

vs.

MARY TOMANIO,

Respondent.

Respondent's Brief on Petition For Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR RESPONDENT

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Respondent's Brief On Petition For Certiorari To The United States Court of Appeals For The Second Circuit.

QUESTIONS PRESENTED FOR REVIEW

1. Does this case involve any new questions of due process not previously settled by this Court, which warrant consideration at this time?

2. In determining that the Regents should have followed due

process procedures in reaching their conclusion, did the Court of Appeals conflict with decisions of the state court as to the arbitrary and capricious nature of conclusions?

3. Does not a previous decision of this Court already support the Court of Appeals finding that the state litigation between the same parties in which the constitutional questions litigated herein were not raised, is not "res judicata" in this matter, simply because Dr. Tomanio could have raised those questions at that time?

4. Is there a conflict between various circuits concerning the tolling of statutes of limitations in civil rights actions, which requires resolution by this Court?

STATEMENT OF THE CASE

Plaintiff, a 62 year old woman, has practiced chiropractic legally in New York State since 1958. After a licensing statute was first enacted there, she took a series of examinations, all parts of which she passed, except one, which she failed by six-tenths of one percentage point. She therefore applied to the New York State Regents for a waiver of that examination requirement, which the Regents were empowered to give by a provision of the education law. The Regents refused her request without giving her a hearing or reasons for their refusal.

Dr. Tomanio then brought an Article 78 proceeding in the state court on January 26, 1972 alleging that the Regents' refusal was an arbitrary and capricious exercise of their authority. Until that time she had continued to practice legally under a "stay" granted to "grandfathers". When she began the state court action she obtained an additional "stay".

The New York State Supreme Court gave judgment for plaintiff and ordered the Education Department to issue a license to her. However, the Appellate Division reversed that judgment and that reversal was sustained by the New York Court of Appeals on November 20, 1975.

On June 25, 1976, Dr. Tomanio brought this action in the United States District Court for the Northern District of New York under the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. Section 1983, claiming that she was denied due process by the Regents when they refused her request for a waiver, without giving her a hearing or specifying reasons for their refusal. Defendants answered and moved to dismiss the action on the grounds of "res judicata", statute of limitations, and failure to state a cause of action.

The District Court denied the motion on all grounds and gave a declaratory judgment that plaintiff has been denied due process. The Court of Appeals, Second Circuit, affirmed. Defendants are now petitioning for certiorari.

SUMMARY

This case presents no new federal question deserving review by this Court. The lower courts correctly found that Dr. Tomanio's interest in continuing her long years of legal professional practice gave her a "property" and "liberty" right warranting due process before that right could be taken from her. That right to due process applied to the waiver request which is a separate procedure for obtaining licensure from the examinations, and was established by separate statute. Therefore, the District and Circuit Courts found that Dr. Tomanio was entitled to a hearing before the Regents refused her request for a waiver, and a statement of their reasons for

that refusal. In this finding those courts relied on decisions of this Court which are wholly applicable and indistinguishable in any relevant way, from the case at bar.

In finding that the Regents must, and did not, give Dr. Tomanio due process before they end her right to practice, the federal courts were not conflicting with any decisions of the state courts. The latter concerned the possible arbitrary or capricious nature of the conclusions reached by the Regents, a separate issue from the procedures employed by the Regents in reaching those conclusions, which was the constitutional matter properly considered by the federal courts herein.

No question concerning the due process of those procedures was raised in the state court litigation and there is therefore no legitimate question of "res judicata". The Regents attempt to apply that doctrine just because plaintiff could have raised those questions in the state court can not succeed in view of this Court's interpretation of the Civil Rights Act. In that interpretation this Court said that relief in the state court need not be sought before a federal civil rights action is instituted. As the Court of Appeals has stated, the only logical extension of that determination is that failure to seek such state relief can not be treated as "res judicata" in a federal civil rights suit.

And finally, there is no conflict requiring resolution among the circuit courts, concerning the policy of tolling local statutes of limitations in civil rights actions such as this one. The Second, Third and Fifth Circuits have all articulated the goal of reducing the flood of civil rights cases in the federal courts and said that that goal is served by tolling local statutes of limitations during the pendency of state actions which may give plaintiffs complete relief. They reason that, in such cases, plaintiffs, knowing they can defer the federal court action until

the outcome of the state suits, may get full relief in the state court and never institute the federal action. There is no indication that any circuit differs with this policy, including the First Circuit which was not dealing with federal tolling policy in the case cited, but rather with the correct interpretation of a local tolling statute. Moreover, even in that case, the Court of Appeals recognized that the fundamental policy of the Circuits is to defer to the discretion of the District Court Judges, as was done by the Court of Appeals in this case, after determining that the facts, including Dr. Tomanio's diligence in seeking relief, warranted the lower court finding.

POINT 1

THE CASE PRESENTS NO NEW FEDERAL QUESTION AND THE LOWER COURT FINDINGS WERE BASED ON APPLICABLE DECISIONS OF THIS COURT.

The Regents have attempted to support their claim that this case presents a new question for this Court which warrants certiorari, by distinguishing it from *Board of Regents v. Roth*, 408 U.S. 564 (1972) in the following three respects, which are irrelevant and or erroneous:

1. The fact that the failure to give due process in this instance preceded the *Roth* decision is without significance because (a) even now the Regents refuse to try to correct their error by granting Dr. Tomanio due process as directed by the District Court; (b) justiciability demands that, in every case decided by this Court, injury precede the action, and the decisions therefore must affect prior acts; and (c) the right to a due process hearing before denial of even admission to a profession, much less retention of the right to practice it, was

established long before *Roth* by this Court in *Willner v. Committee on Character*, 373 U.S. 96, 105 (1962). And Chief Justice Burger made clear the requirement for such due process before "debarment" from livelihood in *Gonzalez v. Freeman*, 334 F.2d 570, 579 (D.C. Cir. 1964). Further, the District and Circuit Court decisions were based not only on the factual finding that Dr. Tomanio's long years of practice give her a "property" interest deserving due process protection under the policies set forth in *Roth* (408 U.S. at 577, 578); but that she also has a "liberty" interest (A-6, B-6)* warranting due process pursuant to *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), which found that the Constitution protects its citizens' freedom to engage in the occupations they choose.

2. This Court has never made a request for a hearing a prerequisite to the application of the due process doctrine where that doctrine mandated a hearing. In fact, this Court has made it particularly clear that such a request is not necessary, by its decisions that, in order to meet the demands of due process, persons threatened with injury to property and/or liberty, must be given notice of the hearing so that they can avail themselves of the opportunity to be heard. *Goss v. Lopez*, 419 U.S. 565, 579, (1975); *Memphis Light v. Craft*, 436 U.S. 1, 13 (1978). If hearings only followed a request for them, the Court would have no reason for such concern that they might take place without the subject's knowledge.

3. Whether or not Dr. Tomanio would receive her license after a hearing is irrelevant. As the Circuit Court said (A-6):

> "A logical argument can be made that since Dr. Tomanio is licensed in two other states, has practiced successfully for so many years, and passed her National Boards, she might be able to convince an impartial hearing officer that she "substantially" meets the requirements of the statute, notwithstanding her failure of the examination by six-tenths of one percent. We express no opinion on the point except that Dr. Tomanio's right to due process would seem, under these facts, independent of her likelihood of success at a hearing."

*References in ( ) are to Petitioner's Appendices and pages thereof.

The lower courts' findings that the prospective outcome of a due process hearing has no effect on the subject's right to it, is supported by the applicable decisions of this Court. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972); *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

The Regents' argument also ignores the facet of both lower court decisions which found additional lack of due process in the failure to give Dr. Tomanio reasons for the refusal of her application for a waiver (A-6, B-8). Those lower court findings were thoroughly grounded on the opinions of this Court. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Willner*, at 105. The significance of that failure was set forth in the Circuit Court briefs when, for the first time, the Regents offered a reason for refusal of the waiver, stating it was not their policy to grant same to any except out of state applicants. Dr. Tomanio believes that the legislative history of New York Educational Law Section 6506 (F-5, F-6) indicates that such a policy perverts the legislative intent. Had that reason been given to Dr. Tomanio when the waiver was refused, the propriety of the Regents' policy could have been, and would have been, litigated in state court action.

Further, there is no merit in the contention of the petition for certiorari that this Court's grants and refusals of relief in cases such as this one, has been based on whether a disciplinary procedure was involved. *Willner*, which accorded relief to an applicant for admission to the bar, refutes that position. And as for the cases cited by the Regents to substantiate it, (a) this Court distinguished between *Roth* and *Perry* not on any discipline concept, but because in the first they found no "property" interest where an untenured teacher's contract was not renewed (*Roth* at 577); and in the second, they felt that a possible "de facto" tenure might have created such a "property" interest (*Perry* at 601); (b) in *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976), this Court acknowledged a due process right to a hearing, but felt the administrative procedures provided an adequate one; and (c) in *Leis v. Flynt*, 99 S.Ct. 698, 701 (1979), the Court found that attorneys admitted in one state had no "property" right to practice law in a sister state. The latter is vastly different than the facts herein on which a "property" interest worthy of due process protection was found by the lower courts, at least partly because Dr. Tomanio is threatened with debarment from a professional practice by which she has supported her family for many years. Even if the element of "opprobrium" which the Regents erroneously claim was determinative in the cases they cite, were required, such debarment would surely satisfy that criteria. But the truly critical factors here were expressed by Justice Marshall in *Board of Curators, University of Missouri v. Horowitz*, 435 U.S. 78, 100 (1978):

> "...when the State seeks 'to deprive a person of a way of life to which she has devoted years of preparation and on which she has come to rely', it should be required first to provide a 'high level of procedural protection' "

The Regents repeatedly stress that Dr. Tomanio has not passed her licensure examination. That has little to do with the matters at issue here. The New York State Legislature specifically provided an alternative way of becoming licensed, other than by passing that examination. That alternative (F-5) involved an application for a waiver and the grant or refusal of same by the Regents. As both lower courts found, in the implementation of that alternative, the Regents had the constitutional duty to follow due process procedures, particularly where, as in this instance, a long-practicing chiropractor had so much at stake that it amounted to a "property" and "liberty" interest. In that duty, the Regents failed.

POINT 2

IN MANDATING THAT NEW YORK STATE EDUCATION LAW SECTION 6506 MUST BE ADMINISTERED WITH CONSTITUTIONAL PROCEDURES THE COURT OF APPEALS DID NOT CONFLICT WITH STATE COURT DECISIONS AS TO THE ARBITRARY AND CAPRICIOUS NATURE OF THE REGENTS' CONCLUSIONS

Both the Court of Appeals and the District Court took great care to refrain from indicating whether or not the Regents should grant the waiver requested by Dr. Tomanio (A-6, B-13). They acknowledged that only the New York State courts could determine whether the Regents' conclusion was correct. But the federal courts did properly utilize their authority to determine whether or not the procedures employed by the Regents in reaching that conclusion were constitutional. The latter is a wholly separate question which was not raised before this action, has not been decided by any

state court, and is surely within the proper province of the federal courts.

The Regents further protest that the requirements of due process would be inconvenient for them to administer. This was considered and rejected by the lower courts. Apart from the District Court's fact finding that due process would impose no great "burden" on the state (B-8), this Court has not allowed administrative agencies to cavalierly dismiss due process with such claims. As Justice White said in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972):

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

POINT 3

THIS COURT HAS ALREADY REVIEWED THE ISSUE OF "RES JUDICATA" RAISED BY THE REGENTS AND ITS DECISION WAS THE BASIS OF THE CIRCUIT COURT'S HOLDING

As previously set forth, the matter of due process at issue here was not raised in the prior state court litigation. The petition for certiorari acknowledges that, but claims that Dr. Tomanio should be barred from raising the issue in the federal court because she could have raised it in the state court. Both

the District and Circuit Courts rejected that notion (A-4, B-5), citing prior decisions in *Ornstein v. Regan*, 574 F.2d 115, 117 (2d Cir. 1978) and *Lombard v. Board of Education*, 502 F.2d 631, 635 (2d Cir. 1974) and other cases. In both *Ornstein* and *Lombard*, the courts based their holdings on this Court's interpretation of the Civil Rights Act in *Monroe v. Pape*, 365 U.S. 167, 183 (1961), in which the Supreme Court ruled that an action under 42 U.S.C. Section 1983 (F-7) could be brought without first seeking relief in the state court. As the Second Circuit reasoned in *Ornstein* and *Lombard*, if there is no requirement that a civil rights action be brought in the state court before such an action is started in federal court, how can the failure to seek that remedy in the state court be treated as "res judicata" in the federal proceeding?

POINT 4

THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE POLICY OF TOLLING LOCAL STATUTES OF LIMITATION IN SITUATIONS LIKE THIS

The petition for certiorari asks this Court to review the matter herein on a claim that the Court of Appeals decision that the New York statute of limitations was tolled during Dr. Tomanio's state litigation, is at odds with the policy in the First Circuit. That is not true. It is true that in the one case cited by the Regents, *Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d 315 (1978), the First Circuit refused to find that the Puerto Rican statute of limitations was tolled. But that refusal was based predominantly on their interpretation of the local tolling statute, not as here, on federal common law tolling policy.

Even in *Ramirez* 575 F.2d at 318, the First Circuit stated

that the basic policy relating to statutes of limitations is to respect the District Court's discretionary right to make the decision. In this case, the Circuit Court articulated the same policy, restricting their finding on this point to a statement that "the district court did not abuse its discretion" (A-4). The Court of Appeals did reiterate the facts which supported the tolling determination (A-4): namely, that Dr. Tomanio had first been granted complete relief by the state supreme court on non-constitutional grounds, and had lost that relief only after successive appeals in the state courts, by which time the applicable three-year statute of limitations had run; and that she thereupon promptly brought suit in federal court on new constitutional grounds.

The policy of allowing the District Court Judge the discretion to find the local statute of limitations tolled in civil rights actions where, as here, a plaintiff may thereby obtain complete relief in the state court and obviate the need to bring a federal action, has been endorsed by both the Fifth Circuit, in *Mizell v. North Broward Hospital District,* 427 F.2d 468, 474 (1970) and the Third Circuit, in *Ammlung v. City of Chester,* 494 F.2d 811, 816 (1974). We submit that there is no conflict among the circuits to be resolved by this Court.

Further, contrary to the Regents' contention, to permit such tolling advances a goal of this Court, the interest of federalism, by reducing the caseload of the federal courts. For, only if a plaintiff is assured of not losing his right to turn to the federal court for relief, will he refrain from bringing such an action until his state litigation is over. And, thus, if he is successful in the state court, he will not have to start a federal suit at all.

CONCLUSION

There is no merit to the Regents' contentions of a new federal question, of conflict with state court decisions, and of need to review "res judicata" and tolling policies, and the petition for certiorari should therefore be denied.

Respectfully submitted,

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